"unless the plaintiff on or before August 24, 1956 [date set in order of July 23] produced . . . the aforesaid transcripts . . . the Court will enter an order dismissing the complaint herein."

Thereafter, the Court directed a letter dated September 6, 1956 (R. 361), to counsel, in which he stated that if the plaintiff had not produced as directed "within the last paragraph of the amended order" the Court would "enter an order dismissing the complaint as provided in the amended order." In reply to this letter, the Court was advised by the plaintiff (R. 362), and by counsel for the defendants (R. 363, 364, 365, 366-367), that the transcripts had not been produced. Thereupon, the Court entered judgments, dated September 13, 1956, dismissing the case (R. 325-328).

SUMMARY OF ARGUMENT

I. *Since the Judgments Of Dismissal Were Procured By Plaintiff, This Appeal Should Be Dismissed Or The Judgments Affirmed.* The orders of July 23, 1956, granting the Association's and other defendants' motions to produce (R. 265, 262, 263, 267) were merely interlocutory orders, and therefore were not appealable. The orders only directed the plaintiff to produce, and contained no provisions concerning non-compliance. Since, at the time the orders were entered, plaintiff had emphatically stated that it would not comply with the orders, and was adhering to that position at the time it moved for and procured the amended order providing that if plaintiff did not produce by August 24, 1956, the complaint would be dismissed, the Court, in entering the dismissal orders, was doing nothing more than what the plaintiff had expressly moved for and requested. It is, therefore, clear that the dismissal of the suit was entirely voluntary on the part of the plaintiff, and that it was procured at its request and consent. The law is firmly settled that this Court will not consider an

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees.*

On Appeal From the United States District Court for the District of New Jersey

BRIEF OF APPELLEE, THE ASSOCIATION OF AMERICAN SOAP & GLYCERINE PRODUCERS, INC.

JAMES T. WELCH
SHELBY FITZE
Counsel for Appellee, The Association of American Soap and Glycerine Producers, Inc.

Of Counsel:

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appeal from a voluntary non-suit, or an order obtained at the request or with the consent of the appellant.

II. *The Trial Court Did Not Abuse Its Discretion In Directing Production Of The Grand Jury Transcripts.* The record in this case overwhelmingly shows that plaintiff used the Grand Jury transcripts extensively in the preparation of this civil case, not only in the pre-complaint stage, but also in preparation for trial.

The use of the Grand Jury by the plaintiff as a pre-complaint civil discovery device, and the utilization of the transcripts to prepare for trial, are wholly inconsistent with the traditional purposes of the Grand Jury. Historically, the basic purpose of the English Grand Jury was the protection of the citizen against unfounded accusation, and to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. The Fifth Amendment of the Constitution of the United States adopted the Grand Jury as it existed at common law at the time that it was adopted, thereby making it a fundamental law of the United States for the prosecution of crimes. In the furtherance of this purpose, came the policy of secrecy. It is inconceivable that the Fifth Amendment's adoption of the Grand Jury as it existed at common law contemplated its use as an *ex parte* pre-complaint and pre-trial discovery mechanism in a civil case. If the Government, in a civil case, uses information gleaned through the use of the Grand Jury, as it admittedly has in the instant case, the historical functions of the Grand Jury have been purverted and its secrecy breached

The plaintiff's only concern in this case is to maintain its preferred position. To permit it to do so would be to make the Grand Jury a pawn in a technical game, instead of respecting it as a great historical body of lay inquiry into criminal wrongdoing. If the Department of Justice uses the Grand Jury as an adjunct to the preparation of civil cases, then the Federal Rules of Civil Procedure,

which the Supreme Court has approved for the trial of civil cases, should apply. The secrecy of the Grand Jury having already been breached and disregarded by the plaintiff in this case, any question with respect to such secrecy has become moot, and the transcripts of the witnesses' testimony taken before the Grand Jury would fall within the same category as any other information in the possession of the plaintiff, which is subject to discovery. In accordance with the precepts annunciated in *Hickman* v. *Taylor*, 329 U. S. 495, the defendants should have equal use of the transcripts in order to obtain the fullest possible knowledge of the issues and facts before trial.

Independent of whether or not the plaintiff has breached the secrecy of the Grand Jury, the Federal Court may remove the seal of privacy when in the Court's discretion the furtherance of justice requires it. (*United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 233-4). Rule 6(e) of the new Federal Rules of Criminal Procedure has implicitly adopted this doctrine. However, in the present case none of the reasons for secrecy of the Grand Jury proceedings exist, inasmuch as any policy in favor of encouraging free disclosures by persons having information with respect to the commission of crimes is, at the most, only of a temporary nature. This temporary and provisional secrecy ceases when the Grand Jury has finished its duties and has either indicted or discharged the persons accused. *VIII Wigmore on Evidence, 3rd Ed.*, § 2362. Furthermore, this provisional and temporary secrecy of a witness' testimony is entirely a matter of his own privilege, and not the Grand Jurors'. VIII *Wigmore on Evidence, 3rd Ed.*, § 2362, *supra.*

The defendants' need of the transcripts in order to properly prepare their defenses has been clearly established. On the basis of the facts and circumstances in this case, the District Court found that since plaintiff is using the

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ranscripts containing relevant evidence, and since equal se of the transcripts by defendants would give them the ullest possible knowledge of the facts before trial, and ince none of the reasons for the rule of secrecy applies, he ends of justice require their production. Such ruling, nder the principles established by this Court, was wholly ithin the Trial Court's discretion, and should not be dis- urbed unless it was clearly *per se* reversible error.

ARGUMENT

I

INCE THE JUDGMENTS OF DISMISSAL WERE PROCURED BY PLAINTIFF, THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENTS AFFIRMED

1. The Dismissal of the Case Was Procured by Plaintiff

The jurisdictional question presented by this appeal is hether the plaintiff may appeal from an order which the laintiff, itself, had moved for and procured.

The order of July 23, 1956, granting the Association's otion to produce (R. 265) was merely an interlocutory rder, and, therefore was not appealable. *Alexander* v. *nited States*, 201 U. S. 117; *Cogen* v. *United States*, 278 . S. 221; *Cobbledick* v. *United States*, 309 U. S. 323, 325- 6; *Pennsylvania R. Co.* v. *Kirkpatrick*, 3 Cir., 1953, 203 . 2d 149, 150; *Bank Line* v. *United States*, 2 Cir., 1947, 3 F. 2d 133, 136; *Apex Hosiery* v. *Leader*, 3 Cir., 1939, 2 F. 2d 702; *R. D. Goldberg Theater Corp.* v. *Tri-States heater Corp.*, D.C.D. Neb. 1944, 119 F. Supp. 521, 523.

Identical orders were entered at the same time with spect to the three manufacturing defendants (R. 262, 3 and 266). It is to be observed that the orders only rected the plaintiff to produce, and contained no provision ncerning non-compliance.

CASES: CITATIONS

when in actual service in time of War or public danger; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

FEDERAL RULES OF CIVIL PROCEDURE, 28 USC.

Rule 41. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof

(1) By Plaintiff; by Stipulation.

* * * * *

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

COUNTER-QUESTIONS PRESENTED

1. The jurisdictional issue presented is whether, when the District Court ordered the plaintiff to produce certain documents and subsequently, upon the motion of the plaintiff, ordered that upon the failure of the plaintiff to make such production; the case would be dismissed, the plaintiff has a right to appeal from an order of dismissal entered after the plaintiff refused to produce.

In the event this appeal is not dismissed or affirmed on the foregoing point; the following question is presented:

2. Did the Trial Court, under the facts and circumstances of this case, abuse its discretion in directing the plaintiff to permit the defendants to inspect and copy the transcripts of the testimony of witnesses who testified before the

Grand Jury which had investigated the very conduct upon which the instant civil case was predicated and where the plaintiff conceded that it had used the transcripts in the institution and preparation of this civil action.

COUNTER-STATEMENT OF FACTS

A Grand Jury sitting in the District of New Jersey from May 1951 until November 25, 1952, investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. The firms under investigation included the four defendants in this civil action: The Procter & Gamble Company ("Procter"), Colgate-Palmolive Company ("Colgate"), Lever Brothers Company ("Lever"), and the Association of American Soap and Glycerine Producers, Inc. ("Association"). No indictment was returned, but sixteen (16) days later, on December 11, 1952, the United States filed a civil suit against these defendants, charging that since 1926 the defendants had conspired to restrain and monopolize interstate commerce in the production and sale of household soap and household synthetic-detergents in violation of Secs. 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 & 2), and that defendants Procter, Colgate and Lever had monopolized that commerce (R. 1-16).

The complaint was broad and complex, covering every phase of the production and sale of household soap and household synthetic-detergents, as well as with respect to the production and sale of the principal materials used in soap and synthetic-detergents, together with certain by-products, derived from the manufacture of soap, such as glycerine. The only affirmative allegation concerning the activities of the Association defendant is that appearing in paragraph 34-C of the complaint:

> "C. The defendant Association has assisted the other defendants in doing the things described in paragraphs 34-A and 34-B of this complaint."

At the time the suit was filed, the Department of Justice issued a Press Release in which it was stated (R. 482):

> "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings. (pp. 2-3)
>
> "In view of these and other factors, further criminal prosecution of defendants would not be effective in achieving the objectives of the Sherman Act." (p. 4).

After the filing of the case, plaintiff made several motions for the production of records, including three (3) omnibus motions involving tens of thousands of documents (R. 48-52, 78-88, 92-105, 106-117).

The first motion made by the plaintiff, filed March 6, 1953, was for an order requiring Procter to produce about 800 documents. These documents were identified by numbers placed upon them by Procter when the documents had been previously produced under Grand Jury subpoenas (R. 50-51, 58).

Attached to the plaintiff's omnibus motions to produce, were affidavits of Joseph E. McDowell, stating that the plaintiff considered its motions as requests for supplementary discovery to add to information previously obtained (R. 90, 104, 117).

Shortly after the discharge of the Grand Jury, the Government's attorney, who conducted the Grand Jury proceeding, in reply to an inquiry as to what happened, stated: "I can't say what happened. I am not unhappy." (R. 54, 387). The same attorney, during a hearing before the Court on plaintiff's first motion to produce, refused to answer the Court's question whether or not he presented the evidence to the Grand Jury "with a view to getting an indictment." (R. 54-55). Later, in an affidavit attached to a supplemental brief of the Government in

support of its motion to produce, the plaintiff's attorney stated (R. 402):

> "(2) That he was authorized and instructed by his superiors in the Department of Justice to carry on a complete investigation of those engaged in the production, processing, distribution, purchase and sale of soap, other detergents or materials used in their manufacture, so that a determination could be made as to whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them or of any other Federal antitrust laws, and as to what action should be taken in performance of the duties of the Attorney General and of the Department of Justice to enforce those laws through criminal or civil proceedings of both;
>
> "(3) That the investigation and all proceedings incident thereto, including the grand jury proceeding in the District of New Jersey in which subpoenas duces tecum addressed to the Procter & Gamble Company were issued, were carried on pursuant to and within those instructions; * * *"

On November 25, 1955, the Association filed a motion for an order directing the plaintiff to produce the testimony of all of the witnesses who testified before the Grand Jury (R. 128-131). In support of this motion, the Association set forth, specifically and in detail, the relevancy of the transcripts and the reasons for the Association's need for them in the preparation of its defense in this case. Similar motions were made by the other defendants (R. 118-120, 113, 134-135).

During the oral arguments on the foregoing motions, the Trial Court asked Mr. McDowell, plaintiff's attorney, the following questions (R. 139, 209):

> "* * * (a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial."

The plaintiff's attorney preferred to discuss the matter with his superiors before answering the question (R. 199), and the Court was subsequently advised by letter (R. 360) that:

> "The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

However, at a later date, during the oral arguments on plaintiff's motion to reconsider, the plaintiff's attorney stated (R. 274):

> "And may I say, your Honor, before going on, that I regret very much any failure or inadvertence on my part which may have given any impression that the Government seeks, or has sought in any way to conceal the use made of the grand jury transcripts in connection with this proceeding. I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but what the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain and prevent violations."

The Court, in its opinion of April 17, 1956, granting defendants' motions to produce (R. 206-218), found (1) that the plaintiff had used and would continue to use the transcripts while preparing for trial; (2) that the transcripts were relevant to the issues in the case; (3) that the defendants would be aided by such production, and that the equal use of the transcripts by defendants would give them the fullest possible knowledge of the facts before

the trial; and (4) that since none of the reasons for the rule of secrecy applied, the ends of justice required their production. The Court attached an Appendix (R. 218-239), showing the size of the case and some of the complex questions involved in its proper administration.

Plaintiff's motion to reconsider, and claim of privilege (R. 247-248) was denied (Court's opinion dated July 9, 1956, R. 257-262), and on July 23, 1956, the Court entered orders directing the plaintiff to produce the transcripts within thirty (30) days from the entry of the orders (R. 262-267).

At the time the orders for production were entered, plaintiff announced to the Court that plaintiff would not produce (R. 330, 331), and prior to the expiration of the thirty (30) day period, filed a "Motion to Amend or Stay Order of July 24, 1956" (R. 317), attaching a "Proposed Amended Order" (R. 318), together with an affidavit of the Attorney General (R. 319), and a brief (R. 320-322). The defendants, while stating that the order of July 23, 1956, was a proper and sufficient order at that stage of the proceedings, did not oppose the order (R. 334).

The reasons given by plaintiff for requesting the proposed amended order were that (Affidavit of Herbert Brownell, Jr.—R. 319):

> "* * * it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

Accordingly, the Court, on August 21, 1956, entered the amended order requested by the plaintiff (R. 322). This order provided that:

At the time the orders of July 23 were entered, the plaintiff stated that it would not produce (R. 330):

> "Mr. McDowell: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered."

Counsel for defendants then stated that since the order provided for production within thirty days, the defendants would wait until the expiration of that time before taking further steps under the rules as may be advisable in the event the Government adhered to its position (R. 330).

However, the plaintiff thereupon announced that the thirty-day provision would make no difference; that the Government would not produce (R. 330):

> "May I say, Your Honor, with respect to the thirty-day matter, we agreed to the inclusion of the provision for thirty days at the request of the defendants, but that it makes no difference to the position of the Government. I was instructed to state that the Government will respectfully decline to produce them."

The Court, addressing its remarks to the defendants, then stated (R. 331):

> "We will wait for thirty days, is that right?"
>
> * * * *
>
> "At which time you shall take such action as you deem necessary under the circumstances."

From this moment on, the orders that followed were at the behest, and upon the motion, of the plaintiff.

Prior to the expiration of the thirty-day period the plaintiff, on August 16, 1956, filed its "Motion To Amend Or, Alternatively, To Stay Order Of July 24, 1956" (R. 317), attaching a "Proposed Amended Order" (R. 318) which provided that:

> "unless the plaintiff on or before August 24, 1956 [date set in order of July 23] produces . . . the afore-

> said transcripts . . . the Court will enter an order dismissing the complaint herein."

The reasons given by plaintiff for requesting the proposed amendment order were that (Affidavit of Herbert Brownell, Jr., R. 319):

> ". . . it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

Shortly thereafter, on August 21, 1956, a hearing was had on the foregoing motion, at which time the defendants stated that while the original order dated July 23, 1956, was a proper and sufficient one at that stage of the proceedings, "the plaintiff's proposed relief of production or dismissal does not seem to be a relief" which defendants could oppose (R. 334, 335). Accordingly, such amended order was entered on August 21, 1956 (R. 322).

Since the plaintiff had previously emphatically stated that it would not comply with the Court's order of July 23, and was adhering to that position at the time it procured the amended order on August 21, it can hardly be gainsaid that the effect of the order, as well as the obvious purposes of the plaintiff in procuring it, was the dismissal of the case. Neither the Court, nor the defendants, had anything to do with the procurement of the order. The Court merely entered it upon the motion and request of the plaintiff, while the defendants interposed no objections. The mere formality of waiting three more days before the Court, *in accordance with the amended order, entered at the request of the plaintiff*, would dismiss the case, did not in any manner add to the order of August 21, for that order had predetermined that the case would be dismissed.

The specious argument advanced by the plaintiffs that "*the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith*" (Plt. Brief 12, 21) is clearly exposed by the fact that the Court had never even so much as intimated that dismissal would be the penalty for non-compliance. The plaintiff, itself, had requested *that* in its amended order. The Court, in its letter to counsel, of September 6, 1956 (R. 361), stated that if the plaintiff had not produced as directed "*within the last paragraph of the amended order*", the Court would "*enter an order dismissing the complaint as provided in the amended order*". The judgments of September 13, 1956, dismissing the case (R. 325-328), all recited that they were based on the record on the case, which necessarily included the amended order procured by the plaintiff.

Thus, the Court in entering the dismissal orders was doing nothing more than what the plaintiff had expressly moved for and requested. Throughout its brief plaintiff recurrently refers to the Government's "suggestion" (Plt. Brief pp. 12, 20, 22, 29, 30). In fact the plaintiff never made any "suggestion". It filed a formal motion, fortified by an affidavit of the Attorney General, together with a brief, moving the Court to dismiss the action if it did not produce, all the while adamantly proclaiming that it would not produce. Under such circumstances, plaintiff cannot effectively say that "The decision thus to amend the order was made by the Court, not by the Government" (Plt. Brief p. 22). If the plaintiff had said "I am not going to produce; dismiss the case", there would have been no question but that it procured the dismissal. It is submitted that, in effect, there is no difference in the plaintiff's stating "I am not going to produce; dismiss the case on August 24, if I do not." That was the situation in the instant case.

It is clear, and the plaintiff does not claim to the contrary, that the defendants did not move under Rule

41(b) of the Federal Rules of Civil Procedure for an involuntary dismissal for failure of the plaintiff to comply with any order of the Court. It is equally clear that the Court below did not move, *sua sponte*, under the same rule. The only remaining two methods of obtaining dismissal would be (1) under 41(a)(1) (i) by the plaintiff without order of Court before service by the adverse party of an answer or motion for summary judgment, or (ii) by filing a stipulation of dismissal filed by all parties who have appeared in the action; or (2) under Rule 41(a)(2), at the plaintiff's instance upon order of the Court. Inasmuch as 41(a)(1), (i) and (ii) are not applicable, the order must have been procured under 41(a)(2), as it actually was.

2. An Order Entered at the Request or With the Consent of the Appellant Is Not Appealable

It is a firmly settled and recognized principle that this Court will not consider an appeal from a voluntary nonsuit or an order obtained at the request or with the consent of appellant. The reasons generally given are that the appellant cannot be heard to object to what he agreed, and he is estopped from convicting the Trial Court of an error which he requested it to commit. *United States* v. *Evans*, 5 Cranch 280; *Evans* v. *Phillips*, 4 Wheat. 73; *Pacific R. R.* v. *Ketchum*, 101 U. S. 289, 295; *Water-Works Co.* v. *Barret*, 103 U. S. 516, 517; *United States* v. *Babbitt*, 104 U.S. 767, 768; *Francisco* v. *Chicago and A. R. Co.*, 8 Cir., 1906, 149 Fed. 354, 355; *Ballot* v. *United States*, 1 Cir., 1909, 171 Fed. 404, 405; *Rudolph* v. *Sensener*, C.A.D.C., 1912, 39 App. D.C. 385; *Marks* v. *Leo Feist, Inc.*, 2 Cir., 1925, 8 F. 2d 460, 462; *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 1936, 86 F. 2d 296, 297; *Fernandez* v. *Carrasquillo*, 1 Cir., 1944, 146 F. 2d 204; *International Carrier-Call and Tel. Corp.* v. *Radio Corp.*, 2 Cir., 1944, 142 F. 2d 493, 494; *United States* v. *All American Airway, Inc.*, 9 Cir., 1950, 180 F. 2d 592; *Doggett* v. *Hunt*, 5 Cir., 1952, 199 F. 2d 152; *Stewart* v. *Lincoln-Douglas Hotel Corp.*,

7 Cir., 1953, 208 F. 2d 379, 381; *Cybur Lumber Co.* v. *Erkhart*, 5 Cir., 1918, 247 Fed. 284; *Curry* v. *Curry*, App. D.C., 1935, 79 F. 2d 172, 174; *United States* v. *Star Construction Co.*, 10 Cir., 1951, 186 F. 2d 666, 669.

The dismissal in the instant case was part of a plan on behalf of the plaintiff to obtain certain benefits, or to be relieved of certain consequences that might conceivably follow its refusal to produce. Under Rule 37(b) of the Federal Rules of Civil Procedure, the Court had the choice of numerous remedies. The plaintiff, apparently not wanting to be restricted, preferred to dismiss the case, and moved for an amended order to that effect. The statement that "it would be unseemly for the chief law enforcement officer of the United States" not to comply with the orders of the Court, is not very convincing. Plaintiff had already stated in open court that it would not do so. Such considerations of unseemliness have not been observed before. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462. Neither by the mere expediency of stating at the time a consent order is entered or a nonsuit taken, that the party intends to seek review, may the right of appeal be established or reserved. *United States* v. *Babbitt*, 104 U. S. 767, 768; *Ballot* v. *United States*, 1 Cir., 1909, 171 Fed. 404, 405.

Babbitt v. *United States*, *supra*, involved the question whether in the computation of longevity pay for an officer in the Army his period of service as a cadet at West Point was to be taken into account. The Court decided it was not, but a *pro forma* judgment was rendered with the consent of the Attorney General in favor of the complainant. This is stated to have been done because the case was one of a class, and the claimant, if judgment had gone against him, could not appeal. Mr. Chief Justice Waite, in delivering the opinion of the Court, said (768):

> "In *Pacific Railroad* v. *Ketchum* (101 U.S. 289), we decided that when a decree was rendered by consent,

> no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion, this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of."

In *Ballot* v. *United States, supra*, the records showed that the consent was given "to expedite the final decision of the issue at bar". The Court in dismissing the appeal, said (405):

> "If we hear this appeal, we disregard the statute establishing this court, which constituted it for this purpose an appellate tribunal; and substantially we would act as a court of first instance. This is not only not allowable according to the rules of law, but, if accepted as a precedent to be followed, would naturally result in a constantly widening departure from what the statute contemplates, throwing on this court a burden which it is not proper for it to assume. Therefore the appeal must be dismissed."

It may be true, as stated by the plaintiff (Plt. Brief pp. 21-22), that *if* the production order as originally entered had provided for dismissal in the case of non-complaince, or *if* after non-compliance the Court had dismissed on its own motion (citing: *United States* v. *Cotton Valley Operators Committee*, 339 U.S. 940; *United States* v. *Zucca*, 351 U.S. 91), the Government could appeal such involuntary dismissal. In suggesting such a possibility, the plaintiff tacitly acknowledges the fact that the Court in the instant case did not dismiss on its own motion, and hence that the dismissal was *not* involuntary. This case is not concerned with what the Court below might have done. In addition to the ones suggested above, it might have done many other things, short of dismissal. The point is that the Court took no action on its own motion. What it did was in accordance with the amended order procured by the plaintiff.

The case of *Thomsen* v. *Cayser*, 243 U. S. 66, upon which the plaintiff relies (Plt. Brief pp. 23-27), is inapplicable

and clearly distinguishable. There the Court of Appeals had already considered and reversed the case on its merits. There were no remaining issues to be further considered, and the functions of the Appellate Court had ended insofar as that stage of judicial process was concerned. Rather than have the case remanded for a new trial, the plaintiff elected to stand on the record and take an appeal. In such a situation it is quite obvious that the plaintiff did not consent to a judgment against them, for the judgment on the merits had already been entered by the Court of Appeals.

The present appeal presents an entirely different situation. Here there is no judgment on the merits, but merely an order of the Trial Court on a procedural matter arising during the pre-trial stage of the case. The plaintiff, being dissatisfied with the Court's ruling, and proclaiming that it would not obey it, moved for and procured an amended order providing that if plaintiff did not obey, the case would be dismissed. It cannot logically or legally contend that the line of cases represented by *Thomsen* v. *Cayser, supra,* has any application to the facts in this case.

The Government, as a litigant, is bound by, and subject to, the same rules of conduct and procedure as any other litigant. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 177; *Bank Line* v. *United States,* 2 Cir., 1947, 163 F. 2d 133, 138. The device adopted by the Government, if successful, would permit any plaintiff who is dissatisfied with an interlocutory order to obtain an immediate review merely by procuring an amended order stating that the case would be dismissed if the plaintiff did not obey by a set date. It is respectfully submitted that such a practice would be contrary to the established principles heretofore followed by the Federal Courts.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIRECTING PRODUCTION OF THE GRAND JURY TRANSCRIPTS

The substance of the plaintiff's argument under its proposition II. that "The District Court Erred in Directing Production of the Grand Jury Transcript" is that the appellees failed to show "good cause". The plaintiff has, apparently, abandoned its "Claims of Privilege" interposed by the Attorney General (R. 248),[1] the filing of which the plaintiff previously insisted "properly invoked the privilege against disclosure of executive papers" (p. 8 of Jur. Statement), and now relies wholly upon the contention that a "disclosure of Grand Jury testimony may be ordered in a civil case only upon the most compelling showing of necessity" (Plt. Brief p. 44). Hence, the plaintiff attempts to rewrite the phrase "good cause", provided in Rule 34 of the Federal Rules of Civil Procedure, to read "the most compelling showing of necessity", and while the plaintiff technically abandons its claim of privilege, it makes substantially the same argument, and relies upon the same cases, as it did under the claim of privilege. That such a criterion is wholly inapplicable and foreign to the facts and circumstances in this case, and that the District Court properly ordered the production of the transcripts of testimony of witnesses taken before the Grand Jury, is clearly demonstrable.

1. The Grand Jury Secrecy Has Been Breached by the Plaintiff

The record overwhelmingly shows that the plaintiff has used the Grand Jury proceedings extensively in the preparation of this civil case, not only in the pre-complaint stage, but subsequent to the filing of the suit. The plaintiff also admits that it intends to use the Grand Jury transcripts in the further preparation of trial.

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[1] See plaintiff's brief, page 31, footnote 13, where the plaintiff states: "We are not here arguing that the transcript is privileged against disclosure, but only that appellees have not shown good cause for its production. But see note 16 *infra* p. 33."

(a) The Use of the Grand Jury Proceedings by the Plaintiff as a Pre-Complaint Civil Discovery

Prior to the filing of this civil action by the plaintiff charging the Association and others with violations of Sections 1 and 2 of the Sherman Act (15 USC 1 & 2), a Federal Grand Jury sitting in Newark, New Jersey, from May, 1951 to November 25, 1952, investigated possible violations of the anti-trust laws in the soap and synthetic detergent industry. The Grand Jury returned no indictments but shortly after its discharge, the Government's attorney, in reply to an inquiry as to what had happened; stated: "I can't say what has happened. I am not unhappy." (R. 54, 387).

On December 11, 1952, slightly more than two weeks later, with Thangsgiving intervening, the United States filed this civil action. The broad, complicated, and extensive scope of the complaint, covering every phase of the production and sale of household soap and household synthetic detergents, as well as the production and sale of the principal materials used in soap and synthetic detergents, together with the sale and production of glycerine, was co-extensive with the sweeping and comprehensive investigation of the Grand Jury in its deliberations of eighteen (18) months duration.

This is shown by the affidavit of plaintiff's attorney to a motion, dated August 20, 1954, "For Discovery and Production of Documents Under Rule 34", in which it was stated that the motion was designed to secure material "supplementary" to that secured by the Grand Jury subpoenas. The affidavit of Joseph E. McDowell, sworn to on August 20, 1954, states (R. 90, 91):

> "* * * With minor exceptions, all of these [documents sought by the motion] are either supplementary to documents and records previously furnished by the Company, or relate to matters with respect to which substantial information has already been furnished by the Company and the other defendants herein in

> the course of the investigation of the soap and synthetic detergent industry conducted by the Department of Justice prior to the institution of this action."[2]

Necessarily, the complaint must have been in the course of preparation many months prior to the discharge of the Grand Jury, during which time the Government was utilizing for such purpose the testimony of witnesses who appeared before the Grand Jury, as well as the documents which had been secured from the defendants in this case through Grand Jury subpoenas. Unquestionably, the complaint was based upon the Grand Jury investigation. This explains why the Government's attorney was "not unhappy". He had accomplished his ultimate and evidently sole purpose—that of securing through the subverted use of the Grand Jury a pre-complaint discovery in order to acquire information upon which to institute and prepare this civil proceeding.

On the same day that the plaintiff filed this civil case, it issued the customary press release. This press release contains the following statement (R. 482):

> "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings.
>
> * * * * * *
>
> "In view of these and other factors, further criminal prosecution of defendants would not be effective in achieving the objectives of the Sherman Act."

The first statement confesses the use of the Grand Jury in the preparation of the complaint, while the latter statement is presumably intended to imply that no indictment was requested.

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[2] The foregoing motion was directed to defendant Colgate. Identical statements were also made in separate motions directed to Procter and to Lever. See R. 104, 117.

Indeed, this fact is tacitly admitted by the persistent refusal of the Government's attorney, Walker Smith, who presented the matter to the Grand Jury, and who later filed the civil case, to answer a question posed by the District Court in that regard. This refusal occurred in a colloquy during an oral argument before the Court below on the Government's motion for discovery and production of documents under Rule 34. The Court asked the Government's attorney several times to answer "yes" or "no" as to whether he "presented the evidence" to the Grand Jury "with a view to getting an indictment". After evading the question three (3) times, the attorney stated on the fourth time that he did not think he should answer the question (R. 54, 55). The fair inference from such adamant refusal by the Government's attorney to answer the Trial Court's question, was that the evidence was not presented with a view to getting an indictment. Shortly thereafter, in an affidavit (R. 402) attached to a supplemental brief of the Government in support of its motion to produce, the plaintiff's attorney stated:

> "(2) That he was authorized and instructed by his superiors in the Department of Justice to carry on a complete investigation of those engaged in the production, processing, distribution, purchase and sale of soap, other detergents or materials used in their manufacture, so that a determination could be made as to whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them or of any other Federal antitrust laws, and as to what action should be taken in performance of the duties of the Attorney General and of the Department of Justice to enforce those laws through criminal or civil proceedings or both;
>
> "(3) That the investigation and all proceedings incident thereto, including the grand jury proceeding in the District of New Jersey in which subpoenas duces tecum addressed to the Procter & Gamble were issued, were carried on pursuant to and within those instructions; * * * "

Inasmuch as only civil proceedings followed the discharge of the Grand Jury, the foregoing statement clearly establishes that the Grand Jury was used as a pre-complaint civil discovery mechanism. Although it does not affirmatively appear from the statement that the institution of civil proceedings was the *sole* purpose of the Government in using the Grand Jury, the probability that it was the sole purpose was not negatived, and the Government, other than resorting to such ambiguous and general statements, has studiously and steadfastly refused to commit itself. The reason for this evasive disinclination on the part of the Government has its roots in the general practice and policy of the Department of Justice respecting the use of the Grand Jury in civil cases.

(b) The Admitted Practices of the Department of Justice of Using the Grand Jury as a Pre-Complaint Discovery Device in Civil Cases

The use of the Grand Jury as a pre-complaint civil discovery process in this case wholly coincides and is consistent with the announced policy and practices of the Department of Justice. This is evident from the sworn testimony of Hon. Stanley N. Barnes, the then Assistant Attorney General of the United States in charge of the Anti-Trust Division, before a Congressional Committee on May 12, 1955 (Hearings Before the Anti-Trust Sub-Committee of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., Part I, pages 244, 245):

> "'Finally, I suggest you may wish to consider means available to the Department for compelling production of data before a complaint has been filed in a civil procedure. At the present time in the investigation of civil matters, the Department must
>
> "'(a) depend upon the voluntary cooperation of those under investigation;
>
> "'(b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

"'(c) make use of the grand jury.

"'Those are the alternatives.

"'From this it seems clear that the sole means for compelling pre-complaint data in civil cases is the grand jury. Some—and I refer to lawyers there primarily—have urged that such use of the grand jury constitutes an abuse of its processes.

"'Mr. Maletz. Do you agree with that position, Judge?

"'Mr. Barnes. I do not.'"[3]

It is explicit in the foregoing statement that the Department of Justice feels free as a matter of general policy and practice to use the Grand Jury for the sole purpose of civil discovery, and, in view of the facts hereinabove set forth, the fair and reasonable inference is that it followed its customary procedure in the instant case.[4] Certainly, if it did not, it was given every opportunity to deny it.

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[3] The same philosophy was expressed by plaintiff's attorney in arguing the Government's motion to produce. See R. 221, footnote 4, where it is stated: "Plaintiff also argued that since the dependency of § 4 upon § 1, 2 and 3 requires a determination as to whether there has been a criminal violation before a civil action can be commenced under § 4, it would not be an abuse of process to undertake grand jury proceedings with the *sole* purpose of preparing for a civil case under § 4."

[4] This practice was criticized in the Report of the Attorney General's National Committee to Study the Anti-trust Laws, p. 345: "The last alternative is the grand jury. Its use where civil proceedings are contemplated from the outset cannot be justified on the purely formal ground that the Sherman Act defines a criminal offense appropriate for consideration by a grand jury, even though it may later be determined that equitable relief is more appropriate. In reality, resort to grand jury in essentially civil investigations stems from lack of an adequate civil discovery alternative.

"We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against

(c) Plaintiff's Use of the Transcripts to Prepare for, and During, Trial

The very first motion made by the plaintiff in this case utilized, and was predicated upon, information obtained through the use of the Grand Jury. This motion (R. 48) filed on March 6, 1953, was for an order requiring defendant Procter to produce certain documents for inspection and copying by the plaintiff. The documents sought, about 800 in number, were identified by numbers placed upon them by defendant Procter when they had been previously produced pursuant to Grand Jury subpoenas (R. 50-51—Opinion of May 11, 1953—R. 56 at p. 58).

This motion was followed by a series of omnibus motions by plaintiff for discovery and production of documents under Rule 34, directed to defendants Colgate, Procter and Lever, respectively (R. 78-91, 92-105, 106-117). Attached to these motions were affidavits of Joseph E. McDowell stating that the plaintiff considered its motions as requests for supplementary discovery to add to information previously obtained during the Grand Jury proceedings (R. 90, 104, 117). Thus, from the inception after the filing of the civil complaint, the plaintiff's basic instrument of attack consisted of the documents and testimony obtained through the Grand Jury.

Preliminary to the arguments of counsel on defendants' motions to produce the transcripts, the Trial Court asked Mr. McDowell, plaintiff's attorney, the following questions (R. 139, 209):

> "Mr. McDowell, do you object to submitting a detailed affidavit stating exactly (a) what use, if any, plaintiff

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flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.

"We recognize that the Department has been handicapped and accept the Judicial Conference conclusions that present civil investigative machinery is inadequate for effective antitrust enforcement. The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails."

> has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial."

After some faltering, plaintiff's attorney stated that he would prefer to discuss the question with his superiors before undertaking an answer (R. 199). Apparently, this was done, and by letter dated December 23, 1955, the Court was advised (R. 360):

> "The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

The Trial Court, in a prior opinion of May 11, 1953, found that the purpose of the Grand Jury investigations was for civil as well as criminal proceedings (R. 59), and in its opinion filed April 17, 1956 (R. 206 at 212-213) expressly found that "plaintiff has used and will continue to use the transcripts while preparing for trial." These findings are confirmed by the subsequent statement made by plaintiff's attorney in his argument on motion to reconsider (R. 274):

> "And may I say, your Honor, before going on, that I regret very much any failure or inadvertence on my part which may have given any impression that the Government seeks, or has sought in any way to conceal the use made of the grand jury transcripts in connection with this proceeding. I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but that the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil

actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain and prevent violations."

(d) The Use By the Plaintiff of the Transcripts Breached the Grand Jury Secrecy

The use of the Grand Jury by the plaintiff as a pre-complaint civil discovery mechanism, and the utilization of the transcripts to prepare for trial in this case, are wholly inconsistent with the traditional purposes of the Grand Jury. Inasmuch as this appeal involves the use of the Grand Jury as an instrument of discovery in a civil case, the status of the Grand Jury in our jurisprudence is a polestar to guide us. The Fifth Amendment of the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

The Grand Jury had its origin in the common law and has existed for many hundred years. Its ancient origin and purposes were set forth by the Supreme Court in *Ex Parte Bain*, 121 U.S. 1, 10, 11, where Mr. Justice Miller quoted with approval the language of Justice Field in a charge to the Grand Jury:

> "'The institution of the grand jury * * * is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing

and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. *Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.* No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.' " (Italics supplied).

The basic purpose of the English Grand Jury was the protection of the citizen against unfounded accusation and to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. *Ex Parte Bain*, 121 U.S. 1, 10, 11; *United States* v. *Olmstead*, 7 Fed. 2d 756, 758; *Costello* v. *United States*, 350 U. S. 359, 361, 362. The Fifth Amendment of the Constitution adopted the Grand Jury as it existed at common law at the time it was adopted, thereby making it a fundamental law of the United States for the prosecution of

crimes. *Ex Parte Bain*, 121 U.S. 1, 10, 11; *Blair* v. *United States*, 250 U.S. 273, 282; *Costello* v. *United States*, 350 U.S. 359, 361, 362; *United States* v. *Olmstead*, 7 Fed. 2d 756, 758; *In Re April 1956 Term Grand Jury*, 239 Fed. 2d 263, 268. In *Costello* v. *United States*, 350 U.S. 359, 362, Mr. Justice Black, in delivering the opinion of the Court stated:

> "* * * There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. * * * Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice."

Thus, it is evident that the Fifth Amendment's adoption of the Grand Jury for use in the Federal Courts in the United States was for the historic purpose of initiating prosecutions for serious crimes. In the furtherance of this purpose, came the policy of secrecy. It is inconceivable that the Fifth Amendment's adoption of the Grand Jury, as it existed at common law, as the fundamental law of the United States for the prosecution of "capital, or otherwise infamous crime", contemplated, by the widest stretch of the imagination, its use as an *ex parte* pre-complaint and pre-trial discovery process in a civil action. Certainly, if the Government, in a civil case, uses information gleaned through the use of the Grand Jury, as it admittedly has in the instant case, it has breached the Grand Jury secrecy.

This rule was enunciated by the Court of Appeals for the Seventh Circuit in *In Re April 1956 Term Grand Jury*, 239 Fed. 2d 263. That case involved certain proceedings respecting alleged violations of the Internal Revenue laws. Government counsel obtained certain material and documents through Grand Jury subpoenas, which material, with the consent of the Grand Jury, was turned over to Treasury agents for examination. It was alleged by the

petitioners that such material was procured as evidence for civil proceedings then or thereafter pending against them. The Court, Judges Lindley, Swaim and Schmackenberg, sitting, in denouncing the use by the Government of such material in a civil proceeding, stated (p. 271):

> "* * * If these efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, *then the secrecy of the grand jury has been breached.* We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The Fifth Amendment's adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings." (Italics supplied).

The Court further pointed out that the application of secrecy to the Grand Jury proceedings is a safeguard for the Grand Jury itself (p. 271-272):

> "* * * because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings [by the government]. Otherwise such misuse of the grand jury's time and functions might in a substantial degree interfere with its investigation of crime and the return of indictments and no bills."

The Court of Appeals then observed that (p. 272):

> "It is significant that the government's counsel in their brief herein, first, do not challenge the proposition that a grand jury subpoena cannot be used for the purpose of obtaining evidence to be used in a civil proceeding; and secondly, do not disclaim an intention to use, in civil proceedings, information gleaned from

examination of the records and documents subpoenaed by the grand jury in this case."

The Court then concluded (pp. 272, 273):

"* * * we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose and specifically for any civil purpose, such as tax collection or otherwise."

* * * * *

"* * * we think it is now apparent that, as far as *civil proceedings* are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under the hereinbefore quoted provisions of the Fourth and Fifth Amendments." (Italics in original).

The foregoing case is directly in point with the instant case. Here, documents and transcripts obtained through Grand Jury proceedings were admittedly taken to the Department of Justice in Washington, and were admittedly used by various attorneys of the Department of Justice for the purpose of this civil proceeding. Through such use, as the Court above so trenchantly states, "the secrecy of the Grand Jury has been breached."[5]

The Department of Justice mistakenly considers itself to be a part of the Grand Jury, or that the Grand Jury is an agency of the Department of Justice. It further claims that the transcript of the testimony of the witnesses taken

[5] The Association does not now claim that the Department of Justice should be barred from using the information and material so obtained. It does say that it should have equal use of the transcripts.

by the Grand Jury is the property of the Department (R. 187, 188). Both claims are clearly erroneous. While the Grand Jury is, in a sense, a part of the Judicial system of the United States (*Hale* v. *Henkel*, 201 U.S. 43, 66; *Cobbledick* v. *United States*, 309 U.S. 323, 327; *United States* v. *Smyth*, 104 Fed. Supp. 283, 291; *In Re National Window Glass Workers*, 287 Fed. 219, 225; *Schmidt* v. *United States*, 115 Fed. 2d 394, 397; *United States* v. *Byoir*, 58 Fed. Supp. 273; *Carlson* v. *United States*, 209 Fed. 2d 209, 213; *United States* v. *Neff*, 212 Fed. 2d 297), its authority is derived from none of the three basic divisions of the Government, but rather from the people themselves. *United States* v. *Amazon Industrial Chemical Corporation*, 55 Fed. 2d 254, 261; *In Re April 1956 Term Grand Jury*, *supra*. Under no circumstances is it an arm of the executive.

Any idea that the Department of Justice has any "property rights" in the transcript was summarily dismissed by District Judge Hartshorne in *United States* v. *Ben Grunstein & Sons Company*, 137 Fed. Supp. 197, 202:

> "Here it should be noted that the Grand Jury is an arm of the Court, not an arm of the plaintiff, the United States Government, which in the present civil case is acting through, not the Court, but its executive arm, the Department of Justice. 'The Constitution itself makes the grand jury a part of the judicial process * * * ' Cobbledick v. U.S., 1940, 309 U.S. 323, 327, 60 S.Ct. 540, 542, 84 L.Ed. 783. *It therefore follows that, strictly speaking, defense is here seeking disclosure, not from plaintiff, but from the Court itself, which obviously should treat the parties alike in their rights to relevant testimony. It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by Hickman, supra.*" (Italics supplied).

In this connection had not the Supreme Court, in approving Rule 6(e) of the Federal Rules of Criminal Procedure, been of the opinion that the transcript of testimony before a Grand Jury was within the control of the Court, it most

certainly would not have adopted or approved this rule. Furthermore, the United States Attorney, and the attorneys empowered by the Attorney General who assist in Grand Jury proceedings, as well as the reporters who record the proceedings, discarded their executive cloaks and became officers of the Court. In *United States* v. *Smyth*, 104 Fed. Supp. 283, 291, the Court says:

> "The grand jury is an arm or agency of the court by which it is appointed. The grand jurors are officers of the court. The United States Attorney, his assistants, the United States Marshal and his deputies and bailiffs, appointed by him to guard their deliberations, and, modernly, the reporters who record their proceedings are likewise officers of the court."

Once having determined that evidence is insufficient (Application of *United-Electrical, Radio and Machine-workers of America*, 111 Fed. Supp. 858, 864) or the Grand Jury is discharged, its function ends. When it ceases to function, the Government's lawyers who assisted the Grand Jury as officers of the Court, immediately lose their relationship as such, insofar as a civil proceeding is concerned, and have no more right to the information obtained through the Grand Jury proceedings than any other party in the case. If they do use the information, they pervert the functions of the Grand Jury and breach its secrecy. *In Re April 1956 Term Grand Jury, supra.* The plaintiff's position shows that it has no real concern with Grand Jury secrecy as such, since it has already breached it, and since it is further ready to breach it during the trial when "appropriate and desirable" (R. 198). Its only concern is to maintain its preferred position in civil cases in which it has used the Grand Jury as an instrument of pre-complaint and pre-trial civil discovery. To so permit is to make the Grand Jury a pawn in a technical game, instead of respecting it as a great historical body of lay inquiry into criminal wrong-doing. If the Department of Justice uses the Grand Jury as an adjunct to the prepara-

tion of civil cases, then the Federal Rules of Civil Procedure, which the Supreme Court has laid down for the trial of civil cases should apply.

The secrecy of the Grand Jury which originally existed having already been breached and disregarded by the plaintiff in this case, any question with respect to such secrecy has become moot (*United States* v. *Byoir*, 58 Fed. Supp. 273), and the transcripts of the witnesses' testimony taken before the Grand Jury would fall within the same category as any other information in the possession of the plaintiff, which is subject to discovery.

2. Since Considerations of Secrecy Have Been Removed by the Plaintiff, Defendants Are Entitled to Inspect and Copy the Grand Jury Transcripts

Under Rule 34 of the Federal Rules of Civil Procedure, a party, upon showing good cause, is entitled to inspect and copy designated documents and papers, not privileged, "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)" in the possession of the other party. The only requirement is that such evidence be "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party," if "the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[6]

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[6] In the Notes of Advisory Committee on Amendments to Rules (28 U.S.C.A. Rule 26, Federal Rules of Civil Procedure, pp. 171, 172) it is stated:

> "Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl* v. *Aetna Life*

It is hardly necessary to state that the testimony of the witnesses before the Grand Jury is relevant to the subject matter and issues. It is patent that the complicated and extensive scope of the complaint was co-extensive with the comprehensive investigation of the Grand Jury. It is admitted, and the Trial Court has so found, that the plaintiff has used and will continue to use the transcripts while preparing for trial. Certainly, had the testimony of the witnesses not been relevant, the witnesses would never have been called before the Grand Jury to testify, nor would the plaintiff be using the transcripts in preparation for trial. The plaintiff has never contended that the transcripts were not relevant, and of course, could not in view of its use of them.

It has been repeatedly said that Rule 34 must be liberally construed in order to further the general purposes of the

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Ins. Co., C.C.A. 2, 1943, 139 F. 2d 469; *Mahler* v. *Pennsylvania R. Co.*, N.Y. 1945, 8 Fed. Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis* v. *United Air Lines Transportation Corp.*, Conn. 1939, 27 F. Supp. 946; *Engl* v. *Aetna Life Ins. Co.*, *supra*; *Mahler* v. *Pennsylvania R. Co.*, *supra*; *Bloomer* v. *Sirian Lamp Co.*, Del. 1944, 8 Fed. Rules Serv. 26B.31, Case 3; *Rosseau* v. *Langley*, N. Y. 1945, 9 Fed. Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co.* v. *Socony-Vacuum Co.*, Wis. 1944, 8 Fed. Rules Serv. 34.41, Case 2 ("... the Rules ... permit 'fishing' for evidence as they should."); Note, 1945, 45 Col. L. Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved."

Federal Rules. *Karlsson* v. *Wolfson*, D.C. Minn. 1956, 18 F.R.D. 474, 475; *Falcon Industries* v. *R. S. Herbert Co.*, D.C. N.Y. 1954, 15 F.R.D. 394, 395; *Royal Exchange Assur.* v. *McGrath*, D.C. N.Y. 1952, 13 F.R.D. 150, 152; *Bingle* v. *Liggett Drug Co.*, D.C. Mass. 1951, 11 F.R.D. 593, 594; particularly where the complaint alleges a conspiracy, as in this case: *Leonia Amusement Corp.* v. *Loew's, Inc.*, D.C. N.Y. 1954, 16 F.R.D. 583, 584; *United States* v. *U. S. Alkali Export Association, Inc.*, D.C. S.D. N.Y. 1946, 7 F.R.D. 256, 259; *United States* v. *Schine Chain Theatres, Inc.*, D.C. W.D. N.Y. 1942, 2 F.R.D. 425, 427; *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.*, D.C. E.D. Wisc. 1944, 7 F.R.D. 134, 136.

The new rules were designed to eliminate surprise and decisions which result from strategy. *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.*, D.C. E.D. Wisc. 1944, 7 F.R.D. 134, 136; *1 Barron and Holtzoff, Federal Practices and Procedure* (1950), Foreword, p. V; *1 Moore's Federal Practice* (1938), 4-5; *Pike and Willis, the New Federal Deposition-Discovery*, 38, Col. L. Rev. 1179 (1938). Similarly the due process clause of the Fifth Amendment incorporates as fundamental law the principles of fair play in the conduct of judicial proceedings. These principles include a "reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18, 19.

The Supreme Court has recognized that the Deposition-Discovery rules are to be given a broad and liberal construction. In *Hickman* v. *Taylor*, 329 U.S. 495, 507, the Court said:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring

into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

[8] "'One of the chief arguments against the 'fishing expedition' objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

The Federal Rules of Civil Procedure apply to the Government as a party litigant to the same degree and extent as they do to any other litigant, and the Government as a litigant "should be held to the same standards of fair dealing as we prescribe for other legal contests." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 177. See also *1 Moore's Federal Practice* (1938), 49.

The *ex parte* and one-sided pre-complaint discovery employed by the plaintiff in this case is diametrically opposed to the spirit of fair play implicit in the Federal Rules of Civil Procedure, as well as being a subversion of the Rules themselves. Not only have these defendants been denied the opportunity and right to be present and cross-examine the witnesses whose testimony the plaintiff has appropriated and used in the preparation of this case, but they are now being denied the right to even inspect or copy the transcripts of the testimony of such witnesses. This unconscionable position is in utter disregard of every basic principle of equity, equality and fair play, and exemplifies trial by battle at its very worst. If the Government elects to institute civil proceedings, it should be willing to proceed under the rules applicable to civil litigation. The opinion of the Supreme Court in the

Jencks case (353 U.S. 657) is based on the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result.

3. The Grand Jury's Secrecy May be Removed by the Court if the Ends of Justice Require It

Independent of whether or not the plaintiff has breached the secrecy of the Grand Jury, the Federal Court may remove the seal of privacy when in the Court's discretion the furtherance of justice requires it. This rule is well established and has long been recognized: *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-4; *United States* v. *White*, D.C. N.J. 104 F. Supp. 120, 121; *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 629; *United States* v. *Alper*, 2 Cir., 156 F. 2d 222, 226; *Metzler* v. *United States*, 9 Cir., 64 F. 2d 203, 206; *United States* v. *Byoir*, D.C. N.D. Tex. 58 F. Supp. 273, 275, Aff'd 5 Cir., 147 F. 2d 336, 337; *Atwell* v. *United States*, 4 Cir., 162 F. 97; *In Re Grand Jury Proceedings*, D.C. E.D. Pa. 4 F. Supp. 283, 284; *In Re Bullock*, D.C. D.C. 103 F. Supp. 639, 641. In *United States* v. *Socony-Vacuum Oil Co., supra*, the Supreme Court, after stating "Grand Jury testimony is ordinarily confidential," declared (p. 234):

> "But after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

The new Federal Rules of Criminal Procedure have implicitly adopted this doctrine. Rule 6(e) provides disclosure of matters occurring before the Grand Jury "when so directed by the court preliminary to or in connection with a judicial proceeding."

At the outset, it should be noted that the issue in the instant case involved only the transcripts of the testimony of the witnesses who appeared before the Grand Jury. It does not involve the discussions and vote of the individual

members of the Grand Jury, or any other matter in any wise connected with its deliberations.

In *United States* v. *Rose*, 3 Cir., 1954, 215 F. 2d 617, 628, the Court adopted the language of *United States* v. *Amazon Industrial Chemical Corp.*, D.C. Md. 1931, 55 F. 2d 254, 261, summarizing the reasons generally given for the rule of secrecy:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

It is apparent that only one, namely "(4)", of the foregoing reasons, could possibly have any application here, and the basis for that one has long since disappeared. At the time the Court below ordered production of the transcripts, the Grand Jury had been discharged almost 3½ years without returning an indictment, and any policy in favor of encouraging free disclosures by persons having information with respect to the commission of crimes can encompass, at the most, only a temporary secrecy. This temporary and provisional secrecy ceases when the Grand Jury has finished its duties and has either indicted or discharged the persons accused. Professor Wigmore states this principle clearly and succinctly (*VIII Wigmore on Evidence*, 3rd Ed. § 2362):

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily

against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury . . .

"But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded . . .

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused. . . ." (Italics in original)

Furthermore, it is to be observed that the secrecy of a witness' testimony is entirely a matter of his own privilege, *and not the Grand Juror's*. This fact is forceably emphasized by Wigmore (§ 2362):

"The privilege, therefore, is not the grand juror's; for he is merely an indifferent mouthpiece of the disclosure. Nor is it entirely the State's; for the State's interest is merely the move for constituting the privilege. The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the *privilege* must therefore be *that of the witness*, and rests upon his consent." (Italics in original)

Wigmore concludes:

"Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the same reasons noted in par. (1) *supra*. . . .

"There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended*, the privilege of the witnesses not to have their testimony disclosed, should be deemed to continue.

> "This is, in effect, the law as generally accepted today. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required '*whenever it becomes necessary in the course of justice.*'. Disregarding a few local exceptions this is in practice no narrower a rule than the one above deductible from principle." (Italics in original)

Indeed, the witness, himself, is under no oath of secrecy, nor may one be imposed upon him. Rule 6(e) of the Federal Rules of Criminal Procedure, while proscribing temporary and limited secrecy on the jurors, attorneys, interpreters and stenographers, specifically forbids the administering of an oath of secrecy to a witness:

> "No obligation of secrecy may be imposed upon any persons except in accordance with this rule."[7]

Even prior to the adoption of the Rules, this was the recognized law. In *United States* v. *Amazon Industrial Chemical Corp.*, D.C. Md., 1931, 55 F. 2d 254, 262, the Court said:

> "Witnesses before federal grand juries are not sworn to secrecy."

Plaintiff suggests, as an abstract matter, that Grand Jury witnesses frequently testify as informers, and that they would be less likely to do so if such testimony were to be made public (Plt. Brief, pp. 40-41). There is nothing in the record of this case to show that any of the witnesses fall within that category, nor does the plaintiff so claim. On the contrary, the plaintiff stated that all of the 28 witnesses who testified before the Grand Jury were

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[7] The Advisory Committee's Note on Rule 6, Subdivision (e) states:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

under compulsion of subpoena (Plt. Brief, p. 41). The witnesses, therefore, could not be regarded as informers. Furthermore, the informer's privilege applies only to the identity of the informer, and where the identity is known, the privilege disappears. *VIII Wigmore on Evidence*, 3rd Ed., § 2374. Since the plaintiff says that the defendants already know the names of the witnesses, and "the government had offered to disclose the names of all Grand Jury witnesses" (Plt. Brief, p. 46), it is difficult to see how the informer's privilege could be pertinent to this case.

It has now been many years since the Grand Jury was discharged without returning an indictment. Any temporary privilege against disclosure of testimony which the witnesses that testify before the Grand Jury may have had, and which Wigmore says terminated "after the Grand Jury's functions ended", has long since expired. To hold otherwise, as Wigmore observes, "would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges." In other words, the privilege against disclosure is now non-existent. It being non-existent, not even the witness, himself, could now claim it. And it being non-existent, it is respectfully submitted that the Department of Justice cannot now claim it.

The cases cited by the plaintiff with reference to the policy of maintaining the secrecy of Grand Jury proceedings are wholly inapposite to the issues in this case, except insofar as some of them recognize the well settled doctrine that a Federal Court may remove the seal of privacy when in the Court's discretion the furtherance of justice requires it. The plaintiff does not cite a single civil case in which the Court denied production where the Government openly admits, as it does in this case, and as the Court has found, that it has used and will continue to use the Grand Jury transcripts in preparation for trial.

The basic principles are clear, and since their application is primarily dependent upon the facts and circumstances of each case to which they are applied, the question whether the ends of justice justified the District Court's ordering the plaintiff to produce the transcripts, must be viewed in the light of the facts in this case. The discussion of this question must necessarily encompass the exercise of the District Court's discretion.

4. The Court Below Properly Found That the Ends of Justice Required Production of the Grand Jury Transcripts

The bases of the District Court's opinion filed April 17, 1956, ordering plaintiff to produce the Grand Jury transcripts, were: (1) that plaintiff had used and would continue to use the transcripts while preparing for trial; (2) that the transcripts contained relevant information; (3) that the defendants would be aided by such production since equal use of the transcripts by the defendants would give them the fullest possible knowledge of the facts before trial; and (4) that since none of the reasons for the rule of secrecy applied, the ends of justice required the production. The Court further stated (R. 217-218):

> "* * * I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy. These motions were considered by me objectively and honestly by setting aside all my preconceived ideas on the subject."

In arriving at his conclusion, Judge Modarelli followed and quoted the precepts enunciated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 501, where it is stated:

> "* * * The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the

preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

Any discussion of this point must necessarily begin with an examination of the type of litigation before the Court. This antitrust civil proceeding falls directly within the category of the classification "Big Case". As the Supreme Court is well aware, there is probably no other field of litigation that affords such complex, protracted and expensive pre-trial and trial proceedings. This fact has become a source of considerable concern to the Court and counsel for the parties, as well as to the litigants, themselves.[8] As the Judicial Conference Report of September, 1951 (13 F.R.D. 61, 64), states:

"Cases of this sort, especially in the anti-trust and patent fields, while not numerous, are of sufficient frequency to create an acute major problem in the current administration of justice. Unnecessary consumption of time and energy, delay in disposition of disputes, and enormous expenditures of money are among the vices resulting from the circumstances described, but the principal vice is that such conditions create confusion, magnify uncertainty, multiply the

[8] McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27 (1950); Whitney, *The Trial of an Anti-Trust Case*, 5 Rec. Ass'n Bar City N.Y. 449 (1950); Handler, *Anti-Trust—New Frontiers and New Perplexities*, 6 Rec. Ass'n Bar City N. Y. 59 (1951); Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165 (1950); CCH, *Symposium on Business Practices under Federal Antitrust Laws* (1951); Chadwell and McLaren, *The Current Status of the Antitrust Laws*, U. Ill. L. Forum 491 (Winter ed. 1950).

possibiilties of error, and otherwise tend to make less certain and less accurate the judicial determination of disputed issues. The latter vices, if permitted to continue to exist, might threaten the judicial process itself in respect to complex controversies."

In its opinion granting the defendants' motions to compel the plaintiff to produce the Grand Jury transcripts, the Court referred to the serious, complex, and unique procedural problems involved in this case, and in the Appendix to the opinion, endeavored to convey some idea of the magnitude of the case, and complexity of the problems involved. During the oral arguments, the Trial Judge repeatedly made it clear that he was concerned with this particular "Big Case" concept—an "anti-trust suit" —and that "he did not want to make a burdensome 'Big Case' more burdensome for anybody" (R. 192, 303, 307, 310).

The practical and efficient conduct of the "Big Case" depends in a large part upon the exercise of judicial discretion. The potential range of issues, evidence, and argument, is so great and complex that this exercise of discretion by the Trial Court must, of necessity, have a wide latitude. A specific problem cannot be segregated and ruled upon, disaffected by, and without relationship to, the potential bearing it may have upon the equitable and efficient conduct of the case as a whole, both present and future. The Trial Judge, who has lived with the "Big Case" from its inception, acquires an indispensable knowledge and insight of its magnitude and complex problems, in the same manner that the trier of a case does with respect to the credibility of a witness. It was the Trial Court's considered opinion that *upon the facts in this case*, the ends of justice would be served in ordering production of the transcripts.

The plaintiff has argued at great length that since the Court in *Hickman* v. *Taylor*, 329 U.S. 495, and *Alltmont* v.

United States, 177 Fed. 2d 971, cert. den. 339 U.S. 967, held that in absence of special circumstances the "work product" of a lawyer was not subject to discovery under Rule 34, the "policy against breaching the secrecy of Grand Jury proceedings is no less strong than the privacy of a lawyer's 'work product' ". After discussing such policy it concludes that a disclosure of Grand Jury testimony may be ordered in a civil case only upon the most compelling showing of necessity.

There are a number of fatalities inherent in such reasoning. In the first place, entirely different considerations and principles are involved as between Grand Jury testimony and a lawyer's "work product". The policy of preserving the "work product" of a lawyer is a continuing one, in the absence of which, this Court stated in *Hickman* v. *Taylor*, *supra*: "The effect on the legal profession would be demoralizing". To the contrary, as has already been discussed, *supra*, and as the Court below found, none of the reasons for maintaining the secrecy of the Grand Jury transcripts apply in this case. It is not claimed that the Grand Jury testimony is the "work product" of the plaintiff, although this claim appears to have been obliquely intimated in plaintiff's brief at page 38, note 17. However, the point was not pressed, nor do the authorities cited support the text. Any intimation that Grand Jury testimony is the "work product" of the plaintiff was tersely dismissed by Judge Hartshorne in *United States* v. *Ben Grunstein and Sons Co.*, 137 Fed. Supp. 197, 202:

> "It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by Hickman supra."

The "most compelling showing of necessity" doctrine advanced by the plaintiff is diametrically contrary to the spirit and purposes of the new Federal Rules of Civil Procedure. It is also contrary to the Supreme Court's construction of the Rules in *Hickman* v. *Taylor*, 329 U.S. 495,

501, 507. The language of the Court has been quoted, *supra*, but its importance would justify a partial repetition.

> "Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."
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> * * * * * *
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> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever he has in his possession."

The plaintiff says that its proposed "most compelling showing of necessity" has not been met here because defendants have not shown that the witnesses are unavailable, or that defendants could not interview them or take their depositions. It should be first observed that such a statement is wholly inconsistent with the plaintiff's contention that to disclose such testimony would be a breach of the Grand Jury secrecy. If each witness had such a phenomenal memory that he could recite verbatim the text of his testimony, the secrecy of the Grand Jury would be breached to the same extent as would result from a reading of the transcript. The same would be true with respect to any part of the testimony the witness could remember.

Of course, the entire idea that the defendants could secure the information through taking the depositions of the witnesses, many years after the discharge of the Grand Jury, is utterly fantastic and unrealistic. The magnitude and complexity of the subject matter of the complaint, covering every phase of the manufacture and sale of household soap and synthetic detergents, as well as the principal materials used in the manufacture of soap and synthetic detergents, would pose the impossible problem of knowing where to begin and what questions to ask. Additionally, tens of thousands of documents that

were subpoenaed by the Grand Jury would have to be examined and correlated to the particular witness, before he could be intelligently interrogated, and there would be no way of pre-determining the relevant documents. Such probing in the dark would at least be wholly inadequate, if not futile. Furthermore, after the lapse of approximately 6 years the witnesses, even if inclined to do so, could not be expected to remember more than the barest substance of their testimony, and there would be many facets concerning which they would have no independent recollection of having testified to. There would be no way of refreshing their memories.

The Court below was eminently aware of the propensity of the witness to change his story. During the oral argument on plaintiff's motion to reconsider, the Court observed (R. 302):

> "* * * I had many things in mind while I was writing this opinion, particularly since for seven years I presented cases to the grand jury in a metropolitan county, * * * I could have a witness testify this week, and I would call him the next week on the same subject and he would give me a totally different story, and if I called him the next week he would give me another story, a third version of what happened."

In *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150, 231, the memories of the witnesses were so faulty that the Government used the Grand Jury transcripts about ninety times to refresh them.

In addition to the foregoing practical considerations, the taking of depositions would impose an undue burden and great and unnecessary expense on these defendants; the delay incident to preparation, and arranging times for the taking thereof in many sections of the United States to meet the convenience of counsel, would be substantial; and the record in this case would be augmented by tens of thousand pages.

The District Court considered and weighed all of the foregoing matters, together with the numerous other factors which must be considered in the proper, just and efficient conduct of a "Big Case". It was the Court's considered judgment that the ends of justice required the plaintiff to produce the Grand Jury transcripts. Such ruling, under the principles established by this Court, was wholly within the Trial Court's discretion, and should not be disturbed unless it was clearly *per se* reversible error.

Under the facts and circumstances in this case, it is respectfully submitted that the order of the District Court directing the plaintiff to produce the Grand Jury transcripts was a proper exercise of the Court's discretion.

CONCLUSION

Since the judgments of dismissal were consented to and procured by the plaintiff, this appeal should be dismissed, or, in the alternative, the judgments should be affirmed.

In the event the appeal is not dismissed or affirmed on the foregoing point, the judgments below should be affirmed on the ground that the District Court did not abuse its discretion in ordering disclosure of the Grand Jury transcripts.

Respectfully submitted,

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